

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

RONALD J. RUDOLPH,

Plaintiff

v.

CITY OF PORTLAND, MAINE,

Defendant

Civil No. 97-230-P-C

Gene Carter, District Judge

ORDER ON PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff Ronald J. Rudolph requests a temporary restraining order preventing Defendant City of Portland from enforcing Portland City Code section 17-2. Plaintiff's complaint seeks injunctive relief on his claims that the ordinance violates and chills his rights under the First and Fourteenth Amendments. Complaint (Docket No. 1). In deciding whether to grant temporary injunctive relief, the Court must weigh (1) the likelihood of the movant's success on the merits; (2) the potential for irreparable harm to the movant if the injunction is not granted; (3) a balancing of the equities, i.e., "the hardship of the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld"; and (4) the effect on the public interest by the grant or denial of the injunction. See, e.g., Gately v. Commonwealth of Massachusetts, 2 F.3d 1221, 1224 (1st Cir. 1993)(quoting Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991)); Merrill Lynch, Pierce, Fenner &

Smith v. Bishop, 839 F. Supp. 68, 70 (D. Me. 1993)(The requirements for preliminary injunctive relief also apply to a request for temporary injunctive relief.).

### I. FACTS

On May 29, 1997, the Portland Police Department publicly announced that it would begin an "anti-panhandling campaign" to crack down on panhandling and educate the public on panhandling. Motion for Temporary Restraining Order and Incorporated Memorandum of Law (Docket No. 2) Ex. B, Portland Press Herald, May 29, 1997. On May 30, 1997, Plaintiff was holding a sign which said "Homeless, Please Care, God Will Bless" and asking for donations on a public sidewalk on State Street in Portland. Motion for Temporary Restraining Order and Incorporated Memorandum of Law Ex. C, Affidavit of Ronald J. Rudolph ¶ 5. At that time, Sergeant Ward of the Portland Police Department issued Plaintiff a citation for "panhandling." Motion for Temporary Restraining Order and Incorporated Memorandum of Law Ex. D, Uniform Summons and Complaint. Upon issuance of the citation, Plaintiff ceased panhandling. Motion for Temporary Restraining Order and Incorporated Memorandum of Law Ex. C, Affidavit of Ronald J. Rudolph ¶ 9. On June 25, 1997, Plaintiff appeared in Maine District Court as directed on the citation. Motion for Temporary Restraining Order and Incorporated Memorandum of Law Ex. C, Affidavit of Ronald J. Rudolph ¶ 8. When Plaintiff inquired about the citation, he was told by court personnel that

it "no longer existed." Motion for Temporary Restraining Order and Incorporated Memorandum of Law Ex. C, Affidavit of Ronald J. Rudolph ¶ 8.

## II. DISCUSSION

Plaintiff alleges that the ordinance at issue, and its enforcement, deprives him of his right to freedom of speech guaranteed to him by the First Amendment. The City of Portland responds that the ordinance may be interpreted in a constitutional manner. Portland City Code section 17-2 provides:

(a) The following definitions shall apply in this section:

(1) "Begging" shall mean the solicitation of money or other valuable consideration without giving consideration in return.

(2) "Loitering" shall have the same meaning ascribed to it in section 17-1.

(b) It shall be unlawful for any person to loiter either for the purpose of begging or to beg either alone or in consort with others in a public place.

(c) The provisions of this section shall not apply to any organization or society that is organized and operated exclusively for religious, educational, philanthropic, benevolent, fraternal, charitable, or reformatory purposes, not operated for pecuniary profit, where no part of the net earnings of which inures to the benefit of any person, private shareholder or individual and provided that any person conducting such solicitation is duly identified as being the authorized agent of such organization or society.

Section 17-1 provides, in pertinent part:

(a) The following definitions shall apply to this section:

(1) Loitering shall mean remaining in essentially

one (1) location, seated or standing, and shall include the concept of spending time idly; to be dilatory; to linger; to stay; to saunter; to delay; and to stand around.

(2) Public place shall mean any place to which the general public has access and a right to resort for business, entertainment or other lawful purpose, but does not necessarily mean a place devoted solely to the uses of the public . It shall also include the front or immediate area of any store, shop, restaurant, tavern or other place of business and also public streets, sidewalks, ways, grounds, schools, areas or parks.

(b) It shall be unlawful for any person to loiter either alone and/or in consort with others in a public place in such a manner as to:

(1) Obstruct any passage of vehicles, traffic or pedestrian public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians; [or]

(2) Commit in or upon any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress and egress therein, thereon and thereto.

Portland City Code section 17-1.

#### A. STANDING

"A credible threat of imminent prosecution can injure the threatened party by putting [him] between a rock and a hard place -- absent the availability of preenforcement review, [he] must either forego possibly lawful activity because of [his] well-

founded fear of prosecution, or willfully violate the statute, thereby subjecting [himself] to criminal prosecution and punishment." Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997)(citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298-99 (1979)). Here, the threat of enforcement is the injury and provides the foundation for justiciability. New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996). Under these circumstances, standing can be conferred even without a showing of past enforcement. Id. The Court finds that in this case, the threat of enforcement is sufficiently credible and immediate to give Plaintiff standing even though the ordinance has not been fully enforced against him.

#### B. FIRST AMENDMENT CLAIM

Federal courts have held that begging is a form of speech and that this form of speech is protected by the First Amendment. Loper v. New York City Police Dept., 999 F.2d 699, 703 (2d Cir. 1993). See also, International Society of Krishna Consciousness v. Lee, 505 U.S. 672, 677 (1982)("[I]t is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment."); U.S. v. Kokinda, 497 U.S. 720, 725 (1990)("Solicitation is a recognized form of speech protected by the First Amendment."); Blair v. Shanahan, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991)("Begging can promote the very values that entitle charitable appeals to constitutional protection."). The

Court finds the statute to be a content-based restriction. The Supreme Court has held that content-based restrictions are subject to strict scrutiny. "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). See also First National Bank of Boston v. Bellotti, 435 U.S. 765, 786-87 (1978)(explaining the strict scrutiny test); NAACP v. Button, 371 U.S. 415, 438 (1963).

The City of Portland argues that the ordinance does not apply to individuals who are simply panhandling in public places. The ordinance, Portland suggests, prevents only panhandling that obstructs a "public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians" or obstructs or interferes with the "free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress and egress therein, thereon and thereto." Portland City Code §§ 17-1(b)(1) and (2).

Plaintiff was cited for violating section 17-2(b) of the Portland City Code, which states that: "It shall be unlawful for any person to loiter either for the purpose of begging or to beg

either alone or in consort with others in a public place." Section 17-2(a)(2) defines "loitering" as having the same meaning ascribed to it in section 17-1. Designating "loitering" in this fashion incorporates all of section 17-1 of the City Code, not just the definition of loitering from that section. Thus, section 17-1, read as a whole, makes loitering unlawful only as follows:

(b) It shall be unlawful for any person to loiter either alone or in consort with others in a public place in such a manner as to:

(1) Obstruct any passage of vehicles, traffic or pedestrian public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians; [or]

(2) Commit in or upon any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress and egress therein, thereon and thereto.

Begging is, therefore, unlawful under the ordinance only if it has the same obstructive<sup>1</sup> characteristics as unlawful loitering. As long as the begging does not constitute an obstruction, it is not illegal under Portland's City Code.

The neutrality of a statute depends on whether it is

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<sup>1</sup> In Cameron v. Johnson, 390 U.S. 611, 616 (1968), the Supreme Court found that a statute prohibiting picketing which obstructs ingress and egress was not unconstitutionally vague.

"justified without reference to the content of the regulated speech." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The panhandling ordinance at issue here is content neutral because it is aimed at preventing the obstruction of public ways regardless of the message accompanying the obstruction. This reading of the ordinance serves the governmental interest of protection and public use of public ways. Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend."). The ordinance is narrowly tailored to meet this compelling state interest. Based on the record made at the hearing on Plaintiff's Motion for Temporary Restraining Order, the Court concludes that he is not likely to succeed on the merits of his First Amendment claim. The Court's conclusion on the "likelihood of success" prong of the temporary restraining order test makes it unnecessary to address the other prongs.

### C. EQUAL PROTECTION CLAIM

Plaintiff also challenges on equal protection grounds the panhandling ordinance's exemption for charitable organizations. That part of the statute provides:

The provisions of this section shall not apply to any organization or society that is organized and



operated exclusively for religious, educational, philanthropic, benevolent, fraternal, charitable, or reformatory purposes, not operated for pecuniary profit, where no part of the net earnings of which inures to the benefit of any person, private shareholder or individual and provided that any person conducting such solicitation is duly identified as being the authorized agent of such organization or society.

Section 17-2(c). Portland argues that it has a compelling interest which justifies the disparate treatment between charitable organizations and individuals: that is, charitable organizations collect and use money for purposes that reduce the tax burden in the community and the individual panhandler is seeking money for his or her own personal use. The Court disagrees that the city's stated reason for disparate treatment rises to the level of a compelling interest.

If a charitable organization obstructs a public way, the city has the same significant interest in keeping it clear for public use as it does when an individual or a group of panhandlers obstructs a public way. The Court finds Portland's attempted distinction to be without significance. The Court concludes, therefore, that Plaintiff's equal protection claim is likely to succeed on the merits.

Nevertheless, the Court will not enjoin the application of the ordinance here because there is no potential for irreparable harm to Plaintiff if the injunction is not granted on equal protection grounds. Portland's charitable organization exemption does not irreparably harm Plaintiff because his actions in the course of panhandling are merely limited; Plaintiff is not wholly

deprived of his opportunity to panhandle. The Court's conclusion on the "irreparable harm" prong of the temporary restraining order test makes it unnecessary to address the other prongs.

Accordingly, it is ORDERED that Plaintiff Ronald J. Rudolph's Motion for a Temporary Restraining Order be, and it is hereby, DENIED.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 21st day of July, 1997.